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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WORCESTER COUNTY, MARYLAND, *et al.*,

Petitioners,

v.

HONISS W. CANE, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Worcester County, Maryland has always used at-large elections for its Board of Commissioners. Respondents alleged that this electoral system violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, by diluting minority voting strength. The district court agreed, citing Respondents' evidence that it was possible to draw a single-member district with a black voting age population majority. Respondents' profferred districting plans, however, segregated voters by race and subordinated the County's race-neutral interests in countywide representation and preservation of municipal boundaries; indeed, Respondents admitted that their plans were intentionally drawn on racial lines. The Fourth Circuit affirmed, reasoning that Respondents' proposed districts did not "ignore" traditional districting criteria and were not "bizarre" in shape. The Fourth Circuit reversed the district court's chosen remedy, however, without holding any of the district court's findings clearly erroneous. The Fourth Circuit then remanded with instructions to impose a race-based single-member districting plan, which had never been offered to the district court as a remedy, for use in special elections this fall. The questions presented are as follows:

1. whether, in light of this Court's ruling in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), a federal court may (a) hold a local government liable under § 2 based on districting plans that subordinate race-neutral redistricting principles to racial considerations, and (b) order such a plan to remedy the purported § 2 violation; and

2. whether a court of appeals may reverse a remedy order and impose a remedy never offered to the district court without determining that its findings were clearly erroneous.

PARTIES

The parties to this proceeding are Worcester County, Maryland; George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Bassett, and Jeanne Lynch, as Members of the Worcester County Board of Commissioners; George H. Dryden, Hinson Finney, and Mark Frostrom, as Members of the Worcester County Board of Election Supervisors; Honiss W. Cane, Jr., Fannie Birckhead, James L. Purnell, Sr., Saunders Marshall, Edward V. DeShields, and William Waters; the Worcester County Voting Rights Coalition; and the Worcester County Branch, NAACP; the Washington Legal Foundation *(amicus curiae)*; The Center For Voting And Democracy *(amicus curiae)*; the Republican National Committee *(amicus curiae)*; and the United States of America *(amicus curiae)*.

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OPINIONS BELOW

The district court's initial liability opinion is reported at 840 F. Supp. 1081 (D. Md. 1994) and reproduced below at Appendix ("App.") 1a-17a. The district court's first remedial opinion is reported at 847 F. Supp. 369 (D. Md. 1994) and reproduced at App. 18a-28a. The Fourth Circuit's first opinion is reported at 35 F.3d 921 (4th Cir. 1994) and reproduced at App. 29a-43a. This Court's denial of certiorari is reported at 115 S. Ct. 1097 (1995) and reproduced at App. 44a. The district court's second remedial opinion and order denying a stay pending appeal are reported at 874 F. Supp. 687 (D. Md. 1995) and 874 F. Supp. 695 (D. Md. 1995) and reproduced at App. 45a-57a and 58a-61a, respectively. The Fourth Circuit's second opinion is unreported, 57 F.3d 1065, 1995 WL 360787 (4th Cir. June 16, 1995) (table disposition) and is reproduced at App. 65a-72a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was rendered on June 16, 1995. Petitioners filed a Motion to Recall the Mandate and Stay Reissuance of the Mandate on June 30, 1995, which the Fourth Circuit denied on July 31, 1995. This Petition for a Writ of Certiorari is being brought to this Court within ninety (90) days of the judgment below, as required by S. Ct. R. 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988). This Petition is not a Cross-Petition and Petitioners know of no party who intends to file such a Petition; thus, the provisions of S. Ct. R. 12.3 do not presently apply.

STATUTORY PROVISIONS INVOLVED

This appeal involves § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (1994 Supp.). The text of this statute is set forth at App. 83a.

STATEMENT OF THE CASE

On June 16, 1995, the Fourth Circuit directed the district court to replace Worcester County, Maryland's at-large system for elections of its Board of Commissioners with a racially motivated single-member districting plan proposed by Respondents. App. 72a. The Fourth Circuit reached this conclusion over the County's repeated objections -- at the liability and remedy phase, at trial and on appeal -- that Respondents' plans, whether offered to prove the County's liability under § 2 or as a proposed remedy for the alleged violation, conflict with the Equal Protection Clause because of their excessive reliance on racial considerations.

A. The County's At-Large Election System

Worcester County, Maryland ("County") is governed by a five-member Board of Commissioners ("Board"). App. 2a. When Respondents brought this action in 1992, Board members were elected at-large in county-wide elections. App. 19a. Four of the five Board members were required to reside in specified residency districts, each of which contained one of the County's major municipalities; no municipality was

split by residency district boundaries. The fifth Board member was not required to reside in any specific district.[1] App. 19a. By combining residency districts with at-large elections, the County thus balanced its interest in geographical diversity (*i.e.*, ensuring that individual municipalities' diverse interests are represented on the Board) with an interest in countywide representation (*i.e.*, ensuring that Board members did not ignore the concerns of County residents outside their home areas). App. 42a.

B. The Liability Trial

Respondents Honiss W. Cane, Jr. *et al.* -- African-American residents of the County and local civil rights organizations -- filed suit against the County's at-large system in November 1992, alleging that it violated § 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973 (1994 Supp.) by diluting minority voting strength. At trial in November 1993, Respondents presented the district court with two race-based, single-member districting plans to prove that the minority population in the County was sufficiently large and geographically compact to support creation of a single-member district with a black voting age population ("BVAP") majority, as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986).[2] These plans, known as "Plan A" and

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[1] During the course of this litigation, the County created a fifth residency district to reflect the development of a fifth population center. As a result, each of the five Board members must reside in a specified residency district. App. 19a.

[2] *Gingles* established that § 2 plaintiffs must prove three "preconditions:" (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the

(Footnote continued)

"Plan B," both purposefully segregated citizens into separate districts on the basis of race, as Respondents' expert admitted at trial:

> Q [By Mr. Griffith, co-counsel for the County]: Mr. Cooper, in terms of how you prepared the map that contains or displays [the proposed BVAP-majority district], would it be fair to say that what you have done is, you have linked together the black concentrations in these three non-contiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?
>
> By Mr. Cooper: Well, obviously, that's what we've done.

App. 84a.[3]

Based on this testimony, the contorted shape of the proposed BVAP-majority districts in Respondents' plans, and

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(Footnote continued)
majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Id.* at 50-51.

[3] The only practical difference between the two plans is that Plan A, which contains a 62.1% BVAP district, divides three County municipalities, whereas Plan B, which contains a 57.8% BVAP district, divides only two. Maps of these plans are being lodged separately with the Court. Respondents also offered a third plan containing seven districts, two of which had BVAP majorities.

their disregard for the County's traditional redistricting principles of countywide representation and preservation of municipal boundaries, the County argued that Respondents' plans violated *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993), which held that districts violate the Constitution when they are "so extremely irregular on [their] face that [they] rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[4]

On January 7, 1994, the district court ruled that the County's at-large electoral system violated § 2 of the VRA. App 15a-16a. Notwithstanding the County's objections that Respondents' proposed plans violated *Shaw*, the district court concluded that the minority community was sufficiently large and geographically compact to create a district with a BVAP majority (the first *Gingles* precondition described *supra*, note 2). The district court held that this finding, in conjunction with the other *Gingles* preconditions and a review of the "totality of circumstances," justified invalidating

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[4] As this Court explained in *Shaw* (113 S. Ct. at 2827),

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

the County's at-large system for Board elections as a violation of § 2. App. 15a-16a. As a remedy, the court imposed a cumulative voting system for Board elections. App. 28a.[5]

C. The First Appeal (§ 2 Liability)

On September 16, 1994, the Fourth Circuit affirmed on the issue of liability, agreeing that Respondents' proposed BVAP-majority districts were sufficiently compact to satisfy *Gingles*. App. 38a. In affirming, the Fourth Circuit rejected the County's argument that Respondents' plans could not be a basis for § 2 liability because they violated this Court's holding in *Shaw*. Instead, the Fourth Circuit interpreted that case as holding that race-conscious redistricting "constitutes impermissible race discrimination only when 'traditional districting principles' are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation." App. 38a n.6 (citing *Shaw*, 113 S. Ct. at 2827).

The Fourth Circuit, however, reversed the district court on the issue of remedy, holding that, in ordering cumulative voting, the district court had inadequately deferred to the County's legitimate interest in structuring its local government. App. 42a. Consequently, the Fourth Circuit

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[5] Under a cumulative voting system, each voter may cast as many votes as there are offices to be filled and may, depending on his/her personal preferences, cast some, all, or none of these votes for a particular candidate, thereby enabling racial and political minority groups to obtain a share of the seats in a governing body more nearly proportional to their share of the population than conventional electoral systems. *See, e.g.*, Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 Cardozo L. Rev. 1135, 1136, 1139 (1993).

remanded the case to the district court with instructions to give the County an opportunity to submit a remedial plan of its choosing. App. 43a.[6]

D. Proceedings On Remand

On remand, the County offered three plans, including its at-large system and a single-member districting plan that divided no municipalities and created a 44% BVAP district.[7] Respondents offered just one plan as a proposed remedy, Plan A, which divided three municipalities and featured a 62.1% BVAP majority district. Following an evidentiary hearing, the district court ordered that primary elections be held under the County's single-member districting plan, finding that this plan offered the black community an equal opportunity to elect a candidate of its choice in the Democratic primary. App. 55a.

The district court also held, however, that the County's plan would not provide a similar opportunity for the black community in the general election and, therefore, could not be implemented for that election. The district court also declined to impose Respondents' proposed Plan A for the general election in light of the County's concerns that the plan unnecessarily divided municipalities and encouraged racial polarization. App. 54a-55a. Instead, the district court once again imposed a cumulative voting system for Board general

[6] The Fourth Circuit also stayed the regularly scheduled 1994 Board elections pending resolution of Respondents' challenge.

[7] This plan was offered solely to respond to the directives of the Fourth Circuit and the district court. App. 84a (testimony of Commissioner John E. Bloxom) . The plan took race into account, but sought to do so in a manner consistent with the County's interest in preserving municipalities.

elections. App. 55a.[8] The district court ordered special elections using this plan, with a primary in September 1995, and a general election in November 1995. Both parties appealed to the Fourth Circuit.

E. The Second Appeal

On June 16, 1995, the Fourth Circuit issued an opinion affirming in part, vacating in part, and remanding the case to the district court. App. 65a. The Fourth Circuit agreed that the County's plan should not be used for general elections. App. 72a. Without identifying any error on the part of the district court, much less a clearly erroneous factual finding, the Fourth Circuit apparently rejected the use of the County's plan in the primaries as well.[9] The Fourth Circuit also rejected the use of cumulative voting. The opinion directed the district court to impose on remand a single-member districting plan (Plan B) that Respondents had offered as a remedy for the first time during appellate oral argument.[10]

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[8] Because of the effect of the order on its local governmental structure, the County asked the district court to stay the order; the request was denied. App. 64a. The County then applied to the Fourth Circuit for a stay of the judgment pending appeal on the same grounds. The Fourth Circuit held the motion in abeyance; after oral argument of the appeal, the County renewed its motion to stay, which the Fourth Circuit denied on June 16, 1995. App. 75a.

[9] This reading of the Fourth Circuit's opinion is also that of the district court. Its order on remand imposes the Fourth Circuit's chosen remedy for both the primary and the general election. App. 78a.

[10] This plan was one of the two racially motivated plans presented to the district court at the liability phase to prove the first *Gingles* precondition; however, this plan was never proposed to the

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App. 71a-72a. Plan B features a district that stretches almost the entire length of the County, dividing two municipalities in the process, for the purpose of achieving a 57.8% BVAP majority. The Fourth Circuit further ordered that its mandate issue "forthwith" so that the court-ordered special elections could go forward as scheduled. App. 72a.

F. The County's Petition For Recall Of The Fourth Circuit's Mandate

On June 28, 1995, the district court entered an order implementing the Fourth Circuit's plan. App. 78a. On June 29, 1995, this Court issued its decision in *Miller v. Johnson*, holding unconstitutional plans that subordinate race-neutral redistricting principles to racial considerations, unless narrowly tailored to further a compelling governmental interest. 115 S. Ct. 2475 (1995). The next day, the County filed a motion asking the Fourth Circuit to recall and stay reissuance of its mandate, especially in light of *Miller*. The Fourth Circuit denied the motion, 2-1, on July 31, 1995. App. 81a-82a. An application for a stay of the Fourth Circuit's judgment pending certiorari was denied by Chief Justice Rehnquist on August 15, 1995.

(Footnote continued)
district court as a remedy. A complete listing of the census units in each district in Plan B is being lodged separately with this Court, together with maps of Plans A and B.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF OVERRIDING NATIONAL IMPORTANCE

This case presents an issue of overriding importance, not just to the County, but to state and local governments across the country.[11] The County's at-large election system -- a system similar to those in place in 60% of cities nationwide[12] -- has been invalidated by a court relying upon two redistricting plans which, had the County enacted them in the first instance, would have violated the standards set forth in *Miller*. Furthermore, the Fourth Circuit's chosen remedy -- one of the race-based plans advanced to prove liability -- also violates *Miller*.

As Justice Blackmun explained in his concurring opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), "special circumstances are presented when a District Court 'reapportions' a municipal government by altering its basic structures." *Id.* at 81. Indeed, "even a temporary alteration of a long-established form of municipal government is a drastic measure for a court to take." *Id.* at 81-82.

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[11] As of January 1992, there were 84,955 units of local government below the state level. These included 3,043 county governments, 19,279 municipal governments, 16,656 town or township governments, 14,422 school district governments, and 31,555 special district/special purpose local government districts. U.S. Bureau of the Census, *1992 Census of Governments*, Vol. 1, Government Organization, No. 1, at v. (Mar. 1994).

[12] *See Holder v. Hall*, 114 S. Ct. 2581, 2595 (1994) (Thomas, J., concurring).

The decisions of the Fourth Circuit here do not merely make "a temporary alteration" in the County's "long-established form of [local] government." Instead, they "alter[] its basic structures." They not only effectively end the County's practice of protecting municipal boundaries and providing for countywide representation on the Board, but for the first time make race the overriding qualification for election to a seat on the Board. Thus, the system imposed by the Fourth Circuit not only changes the County's tradition of county-wide elections but, as the County shows *infra*, also violates *Miller*. Moreover, because the County's at-large system "is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation," *id.* at 60 (plurality opinion), the Fourth Circuit's decisions, if upheld, will have serious consequences across the country.

Accordingly, the Court should grant certiorari to clarify that at-large election systems do not violate the VRA when the only proof of a sufficiently numerous and geographically compact minority community, which this Court in *Gingles* deemed a "precondition[]" to § 2 liability, is a plan that subordinates traditional redistricting principles to racial considerations. Furthermore, the Court should prohibit lower courts from replacing at-large systems with remedial plans that violate *Miller*. Finally, the Court should require that an appellate court reviewing findings of vote dilution reverse them only when it expressly holds that they were clearly erroneous.

II. THE JUDGMENT BELOW CONFLICTS WITH THIS COURT'S HOLDING IN *MILLER*

This Court should grant certiorari and reverse the judgment below because the Fourth Circuit's decisions violate the standards set forth in *Miller*. In that case, the Court held that a redistricting plan violates the Constitution when race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," unless the plan is narrowly tailored to further a compelling governmental interest. 115 S. Ct. at 2488. To prove a plan unconstitutional under *Miller*, a plaintiff must show that the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*[13] *Miller* does not require a threshold showing that the challenged district is bizarrely shaped. *Id.* at 2486. To the contrary, "evidence

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[13] In determining whether a district recognizes communities of interest, a legislature may not assume that "individuals of the same race share a single political interest. The view that they do is 'based on the demeaning notion that members of the defined racial groups ascribe to certain "minority views" that must be different from those of other citizens,' the precise use of race as a proxy the Constitution prohibits." *Miller*, 115 S. Ct. at 2487 (citation omitted). The Court explained that

> [s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its

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other than a district's bizarre shape can be used to support" a claim that race was the predominant factor in drawing the district. *Id.* at 2487.

Applying these principles, the Court in *Miller* invalidated a majority-minority congressional district that stretched more than 260 miles across Georgia, "connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County," including portions of the City of Savannah. *Id.* at 2484. The district "'split[] eight counties and five municipalities along the way.'" *Id.* (citations omitted).

The Fourth Circuit's decisions here on liability and remedy both contravene the holding of *Miller*.[15] In affirming

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(Footnote continued)

> own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."

Id. at 2486.

[15] Although this Court denied certiorari from the Fourth Circuit's previous decision affirming the district court's liability holding, denial of certiorari at the interlocutory stage of a proceeding is without prejudice to the renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949). The County has preserved below its objection to the holding of liability; therefore, this Court may properly review that objection here. *See* Transcript, Remedial Hearing, *Cane et al. v. Worcester County et al.*, No. 92-CV-3226, at 4 (D. Md. Dec. 2, 1994) (reproduced at App. 85a); Brief of Appellants/Cross-Appellees Worcester County *et al.*, *Cane et al. v. Worcester County et al.*, Nos. 95-1122,

(Footnote continued)

the district court's determination of liability under the VRA, the Fourth Circuit held that race-conscious redistricting violates the Constitution "only when 'traditional districting principles' are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation." App. 38a n.6 (emphasis added). Under *Miller*, however, geographical "bizarreness" is not a prerequisite to a constitutional violation. 115 S. Ct. at 2486-88. Moreover, under *Miller*, the test is not whether a plan "ignores" traditional redistricting principles but, rather, whether it "subordinate[s] . . . traditional race-neutral districting principles . . . to racial considerations." *Id.* at 2488. *See also id.* at 2499-500 (Ginsburg, J. dissenting) ("'strict scrutiny' will be triggered not only when traditional districting practices are abandoned, but also when those practices are 'subordinated to' -- given less weight than -- race").

Here, there can be no doubt that racial considerations dominated the plans the lower courts relied upon in holding that Respondents had established a § 2 violation. As Respondents' own expert admitted at trial, these plans were *intentionally* drawn on racial lines to segregate voters into different districts for the purpose of creating a district with a BVAP majority. App. 84a (Cooper testimony). These plans reflect the assumption -- expressly rejected in *Shaw* and *Miller* -- that black voters in Worcester County constitute a community of interest simply because of their race. *See* App. 6a ("[t]he plan merely affirms the existing racial divisions in the County"). Thus, Respondents' *entire* case rests on plans that violate *Miller*. Indeed, had the County enacted either of

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(Footnote continued)
95-1688, at 16 n.19 (4th Cir. Apr. 12, 1995) ("[W]e wish to preserve our argument that the Appellants have no liability under § 2.").

Respondents' plans, it would have been subject to a challenge under *Miller* because of the overwhelming racial motivation present in each plan. As a result, neither plan is a proper foundation for a holding that Respondents satisfied the first *Gingles* precondition of a sufficiently numerous, geographically compact minority population. Therefore, the liability holding itself is defective because it relied on plans that violate *Miller*.[16]

Because the liability holding violated *Miller*, the race-based plan the Fourth Circuit imposed as a remedy likewise must fail. *See Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (absent proof of the *Gingles* preconditions, "there neither has been a wrong nor can [there] be a

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[16] Of course, under *Miller*, a race-based plan can be implemented if narrowly tailored to further a compelling governmental interest. 115 S. Ct. at 2490. No such showing has been, or could be, made here. The only possible governmental interest here is compliance with the VRA; however, as the County has noted repeatedly, that interest is absent because Respondents cannot satisfy the *Gingles* preconditions to § 2 liability. As *Miller* holds:

> [C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. The congressional plan challenged here was not required by the [VRA] under a correct reading of the statute.

115 S. Ct. at 2491 (citing *Shaw*, 113 S. Ct. at 2830-31). *See also Growe v. Emison*, 113 S. Ct. 1075, 1085 (1993) (invalidating judicially-imposed majority-minority district because "the *Gingles* preconditions were not only ignored but were unattainable").

remedy"). But, even assuming *arguendo* that the Fourth Circuit's liability holding did not violate *Miller*, the use of Plan B as a remedy would still be improper, because federal courts have less freedom to impose race-based remedies for violations of the VRA than do state and local legislatures. *See Shaw v. Hunt*, 861 F. Supp. 408, 434 n.21 (E.D.N.C. 1994) (three-judge court), *prob. juris. noted*, 115 S. Ct. 2639 (1995). Here, the Fourth Circuit's imposition of Respondents' alternative plan (Plan B) as a remedy violates *Miller* because this plan intentionally segregates voters into separate districts on the basis of race.[17] Plan B features a district that stretches almost the entire length of the County, splitting two municipalities in the process, for the purpose of achieving a 57.8% BVAP majority. It is at least as non-compact as the plan struck down in *Miller*. *Compare* Plan B (lodged separately with this Court) *with Miller*, 115 S. Ct. at 2496, 2503. App. B. The Fourth Circuit plan thus "subordinate[s] traditional race-neutral districting principles,

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[17] Nor is Plan B insulated from an equal protection challenge simply because a private actor, Respondents' expert, drew it. Because a plan becomes a governmental act once the County implements it, the County would violate the Constitution were it to implement Respondents' impermissibly racially motivated plan. In fact, *Miller* invalidated a plan drafted by the American Civil Liberties Union (ACLU) and then enacted, with modifications, by the Georgia General Assembly. 115 S. Ct. at 2484 (discussing the drafting and enactment of ACLU's "max-black" plan). In this case, the Fourth Circuit directly imposed Respondents' Plan B. If a private actor's plan subsequently enacted by a legislature can violate *Miller*, then it follows (given the limited freedom courts have to fashion remedies) that judicial imposition of an impermissibly racially motivated, albeit privately drawn, plan must also be unconstitutional under *Miller*. *Cf. Shelley v. Kramer*, 334 U.S. 1 (1948) (prohibiting judicial enforcement of private, racially restrictive covenants as "state action" within reach of the Fourteenth Amendment).

including . . . compactness . . . [and] respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller*, 115 S. Ct. at 2488.

In short, the Fourth Circuit used Respondents' plans both to invalidate the County's at-large election system and replace it with a racially motivated single-member districting plan. If the County were to enact these plans, they would contravene this Court's ruling in *Miller*, and therefore the Fourth Circuit should not be permitted to force the County to implement them. Accordingly, this Court should grant certiorari to resolve the conflict between *Miller* and the judgment below.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS FOR APPELLATE REVIEW OF DISTRICT COURTS' FACTUAL FINDINGS IN VOTING RIGHTS CASES

This Court should also grant certiorari because the Fourth Circuit failed to apply the "clearly erroneous" standard of review to the district court's findings of fact regarding remedy. Instead, the Fourth Circuit substituted its own judgment based upon matters not raised before the district court at the remedy hearing.

This Court held in *Gingles* that a district court's factual findings in a § 2 case should be reviewed under the "clearly erroneous" standard:

> [T]he clearly erroneous test of [Fed. R. Civ. P.] 52(a) is the appropriate standard for appellate review of a finding of vote dilution . . . . [T]he trial court is to consider the "totality of circumstances" and to determine, based "on a searching practical evaluation of 'past and present

> reality,'" whether the political process is open to minority voters . . . . [T]he application of the clearly-erroneous standard to ultimate findings of vote dilution [thus] preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

Gingles, 478 U.S. at 79 (citations omitted). Under this standard, a reviewing court cannot reverse simply because it is convinced it would decide the case differently from the trier of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

Here, the district court found that the County's plan containing the 44% BVAP district would satisfy the VRA with respect to the Democratic primary election. App. 56a. Under this plan, the district court found, "African-American voters of the County will have an opportunity to elect a candidate of their choice [in the primary], but that opportunity will not come at the expense of geographical diversity, the division of municipalities, or racial segregation." *Id.* The Fourth Circuit apparently reversed on this point without an explanation of why the district court's findings were clearly erroneous; indeed, there was no statement at all by the Fourth Circuit that *any* of the district court's factual findings were erroneous.[18]

[18] The Fourth Circuit's opinion also conflicts with Fifth Circuit precedent requiring a district court in a § 2 case to support its decision with particularized findings of fact to facilitate appellate review. *See, e.g., Velasquez v. City of Abilene*, 725 F.2d 1017, 1020-1021 (5th Cir. 1984) (finding that trial court must discuss substantial contrary evidence so that appellate court can evaluate the thought processes of the court below). Just as the district court must explain its consideration of the evidence, so too must an

(Footnote continued)

The Fourth Circuit also ordered implementation of Respondents' Plan B, finding that this plan would provide minority voters with the opportunity to elect candidates of their choice. App. 71a-72a. The district court, however, was *never* presented with this plan as a possible remedy.[19] Thus, the Fourth Circuit improperly substituted its judgment regarding an appropriate remedy for that of the court below, without according the lower court the initial opportunity to consider Plan B as a remedy. The Fourth Circuit's invalidation of the County's at-large system in favor of Respondents' Plan B -- without an opportunity for the district court to apply its "particular familiarity with the indigenous political reality" -- thus conflicts with this Court's standards for appellate review of vote dilution decisions set forth in *Gingles*, 478 U.S. at 79-80. Consequently, this Court should grant certiorari to resolve the conflict.

(Footnote continued)
appellate court explain why a district court's findings were clearly erroneous. Without such an explanation, this Court is "unable to determine from a silent record the thought processes of the court below." *Id.* at 1021. This Court, therefore, should grant certiorari in this case in part to resolve this conflict between the Circuits.

[19] Respondents offered only one plan at the remedial hearing: Plan A, which featured a 62.1% BVAP-majority district. App. 85a (remedial hearing). Plaintiffs' alternative Plan B, which contained a 57.8% BVAP district, was offered only during the liability phase of the trial for the limited purpose of demonstrating that the minority community was "sufficiently large and geographically compact" to justify creation of a single-member district, as required in *Gingles*, 478 U.S. at 50. This plan is not, however, automatically valid as a proposed remedy. *See Clark v. Calhoun County*, 21 F.3d 92, 95 (5th Cir. 1994) ("[P]laintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-black district is feasible.").

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Fourth Circuit's use of Respondents' racially motivated single-member redistricting plans to invalidate and replace the County's at-large election system. Failing that, the Court should withhold its disposition of this Petition pending the Court's decisions in *Shaw v. Hunt* and *Bush v. Vera, prob. juris. noted*, 115 S. Ct. 2639 (1995), which will likely shed further light on this case.

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